

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN WAYNE MYKOLAITIS,

Defendant-Appellant.

UNPUBLISHED

July 17, 2008

No. 273578

Oakland Circuit Court

LC No. 2005-203969-FC

Before: Meter, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 50 to 100 years for the murder conviction and 5 to 40 years for the felon-in-possession conviction, to be served consecutive to two concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

I. Underlying Facts

Defendant's convictions arise from the shooting death of Cameron Sanders. Defendant and Sanders met each other in prison where they discussed plans to engage in criminal activity together after they were released. Their discussions included drug dealing, property insurance fraud, and life insurance fraud involving the fabricated death of the insured.

In April, 2002, after they were released from prison, defendant and Sanders filed articles of incorporation for an entity known as Extensive Enterprises, Incorporated. This corporation never conducted any business or produced any known financial records. In January 2003, Sanders and defendant purchased life insurance policies on their lives in which Extensive Enterprises was named as the beneficiary. The death benefit of these policies was \$600,000. Around this time, Sanders became involved in a property insurance fraud scheme whereby he falsely reported that various items of property were stolen from a trailer he was buying from defendant. Sanders also acquired materials explaining how to assume a false identity and acquire Norwegian citizenship.

On April 9, 2003, Sanders received insurance proceeds of \$6,110.38 in connection with his property theft claim. Defendant maintains that Sanders intended to use the money to purchase a large quantity of marijuana for resale. On the night of April 10 and 11, 2003, defendant and Sanders met in the parking lot of a Denny's restaurant at the Twelve Oaks Mall in Novi. Defendant contends that he met with Sanders around midnight, but did not stay long because his wife expected him home. He informed the police that when he left, Sanders was waiting for his drug delivery.

Witnesses at the Twelve Oaks Mall heard gunshots around 1:30 a.m. on April 11, 2003. Sanders's body was later discovered on April 14, 2003, on an unpaved road that could be accessed from the ring road around the Twelve Oaks Mall complex. He had been shot and stabbed multiple times. Police videos showed a truck similar to defendant's vehicle, including a missing running board, in the vicinity of the mall close to 1:30 a.m.

Detective Victor Lauria, the officer in charge of the investigation, interviewed defendant twice, with his consent, in the presence of counsel. Defendant stated that Sanders was alive and waiting for his drug delivery when defendant left the parking lot. At each interview, defendant used a diagram of the mall area to describe how he entered and left, and to show where he and Sanders were parked during their meeting. The description he gave at the second interview differed from the description he gave at the first.

In 2005, defendant was charged with first-degree murder, felon in possession of a firearm, and two counts of felony-firearm. Following a jury trial, he was acquitted of first-degree murder, but convicted of second-degree murder and the firearms charges.

II. Jury Requests for Supplemental Instructions

Defendant argues that the trial court erred by accepting the jury's verdict without first responding to two earlier requests by the jury for reinstruction on the requirement of unanimity and the definition of premeditation.

On the second day of jury deliberations, the trial court advised the parties that it had received "three notes from the jury, two of which have now become moot but I think it is important for the record just to read them into the record." The court read the notes as follows:

The first note was, we have a procedural question, does the decision of degree of count 1 [first-degree murder] have to be unanimous; also counts 2, 3 and 4. The second question – well, when I got that question I asked for counsel to be called and – and that was, I don't know, 20 minutes ago, half hour ago; then in the interim we got a second question a few minutes later which says we need more clarification of the definition of premeditated. And then within a few minutes of that we have received the final note which says we have a verdict, which all these came in in [sic] the interim between the first one and when counsel was available to come to the court, so we're going to go ahead and take the verdict; we'll obviously poll the jury especially based on the first question to make sure that they did indeed follow the instructions as has been read.

Because defendant did not object to the trial court's failure to respond to the jury's first two questions, this issue is unpreserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 597 NW2d 130 (1999); *People v Kahley*, 277 Mich App 182, 183; 744 NW2d 194 (2007).

Ordinarily, a trial court's response to a jury's request for supplemental instruction should be responsive to the request and not misleading. *People v Katt*, 248 Mich App 282, 311; 639 NW2d 815 (2001), *aff'd* 468 Mich 272 (2003). Here, however, the trial court did not have the opportunity to respond to the jury's first two requests because the jury indicated that it had reached a verdict shortly after it submitted the first two questions. By doing so, the jury indicated that it was able to reach a verdict without the trial court's assistance on those submissions, eliminating the need for further instruction. Accordingly, the trial court's failure to respond to the jury's first two requests for reinstruction was not plain error.

Furthermore, defendant's substantial rights were not affected. Defendant's conviction of second-degree murder indicates that the jury did not find that the murder was premeditated. Thus, a supplemental instruction on premeditation could not have resulted in a more favorable outcome for defendant. Additionally, defendant was not prejudiced by the trial court's failure to respond the jury's inquiry regarding whether its verdict must be unanimous. The jury was polled and each individual juror agreed that the second-degree murder verdict was his or her verdict, thereby establishing that the verdict was unanimous.

For these reasons, we reject this claim of error.

III. Sufficiency of the Evidence.

Defendant next argues that the evidence was insufficient to support his convictions. He does not dispute that there was evidence to establish each of the crimes of which he was convicted, but rather argues that the evidence was insufficient to establish his identity as the perpetrator. We disagree.

Issues regarding the sufficiency of the evidence are reviewed *de novo* by this Court. *People v Williams*, 268 Mich App 416, 419; 7070 NW2d 624 (2005). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

The prosecutor must establish beyond a reasonable doubt that the defendant was the perpetrator of every charged offense. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). "Identity may be shown by either direct testimony or circumstantial evidence." *Id.* Here, defendant argues that the circumstantial evidence was insufficient to establish his guilt in the absence of eyewitness testimony, physical evidence, or an admission of guilt. We disagree.

The evidence showed that defendant and Sanders formed a corporation with no purpose other than to serve as the nominal beneficiary for life insurance policies, in conjunction with a plan to defraud the insurance company by faking Sanders's death. The jury could have inferred

that defendant decided to kill Sanders instead of fabricating his death, to avoid complications arising from proving a claim without a body.

In addition to evidence of a motive, Sanders told others that he was going to meet a person named “Kevin” at the Twelve Oaks Mall on the night Sanders was last seen. Moreover, defendant admitted that he met Sanders at the Twelve Oaks Mall late that night and, although defendant represented that the meeting took place around midnight, police videos showed a vehicle resembling defendant’s truck—identifiable by the missing running board—driving in the mall area around 1:30 a.m., which is the time two witnesses heard gunshots.

Further, defendant’s behavior following the discovery of Sanders’s death supported an inference of consciousness of guilt. He made threatening statements to Erika Gebhardt when she asked questions about defendant’s contacts with Sanders on the night of his death. He also made statements to other witnesses in which he attempted to denigrate Sanders’s character.

Additionally, defendant made incriminating statements to his cellmate, Michael Allen, indicating that he committed the offense for which he was awaiting trial. Although defendant asserts that Allen was not credible, the credibility of his testimony was for the jury to resolve. *Williams, supra* at 419.

Defendant also contends that the evidence was insufficient to establish his identity as the perpetrator because there were other plausible explanations for Sanders’s homicide, such as Sanders’s alleged involvement in drug dealing, and there was evidence that other people may have had a motive to harm him. However, the prosecution is not required to rebut any and all theories that could prove a defendant innocent. Rather, the prosecution “need only submit evidence sufficient to convince a reasonable jury of the existence of the elements of the crime in the face of whatever contradictory evidence the defendant provides.” *Id.* at 421. The evidence in this case, viewed in a light most favorable to the prosecution, was sufficient to establish defendant’s identity as the perpetrator beyond a reasonable doubt.

IV. Defendant’s Standard 4 Brief

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, none of which have merit.

A. Defendant’s Civil Deposition Testimony

Defendant argues that his statements from a deposition in a civil case were improperly admitted at trial because he was not advised of his *Miranda*¹ rights before the deposition was taken. Because defendant did not object to the challenged testimony at trial, this issue is not preserved. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 632 NW2d 67 (2002). Unpreserved claims of constitutional error are reviewed for plain error affecting a defendant’s substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

In Michigan, the police are obligated to give *Miranda* warnings to an accused “only when the person is subject to custodial interrogation.” *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002). “Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody.” *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). Here, defendant was not in police custody at the time his deposition was taken. Accordingly, *Miranda* warnings were not required.

Further, the record does not support defendant’s claim that the attorney representing the insurance company, Charles Rudy, was acting on behalf of the police when he took defendant’s deposition. Detective Lauria testified that he shared information with Rudy to help him prepare for the deposition, and that he hoped the deposition would produce helpful information, but there was no testimony or evidence that Lauria requested or authorized Rudy to act on the department’s behalf. Rudy denied acting on the department’s behalf when he took defendant’s investigation.

For these reasons, the admission of defendant’s deposition testimony did not constitute plain error.

B. Defendant’s Response to a Hypothetical Question

At trial, Michael Allen testified about a conversation he had with defendant while the two were incarcerated in the Oakland County Jail. Allen told defendant about a time when he confronted persons who had stolen his drugs, but found himself unable to kill them. Defendant responded that he would have killed them if he had been in Allen’s situation. Allen then asked defendant whether he committed the offenses with which he was charged, and defendant nodded his head. Defendant objected to the first part of this testimony, arguing that it was irrelevant and unfairly prejudicial. The trial court overruled the objection, but instructed the jury that it could consider the evidence only for the purpose of showing the context of Allen’s conversation with defendant, and not for its truth or to show that defendant had a propensity to act in a particular way.

We review this evidentiary issue for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401; *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127 (2004). “Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible.” *Id.* at 553; MRE 402. Relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403; *Fletcher*, *supra* at 553.

Here, defendant’s statement that he would have killed the drug thieves if he had been in Allen’s situation was relevant to explain the context of his non-verbal admission that he

committed the offenses of which he was charged. It provided a context to Allen's question that was relevant to an evaluation of the credibility of the latter response. A jury might otherwise wonder why Allen asked the question spontaneously. The trial court clearly and promptly explained that the statement could be considered only for this narrow purpose, and that the jury could not consider it as evidence of defendant's propensity to commit murder. Jurors are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 299 (1998).

Furthermore, the probative value of the statement was not substantially outweighed by the potential for unfair prejudice. It was clear from the questioning that defendant's statement involved a hypothetical situation. Additionally, defense counsel was permitted to extensively cross-examine Allen, and elicited Allen's admission that persons in prison often lie or exaggerate in order to impress other inmates. Further, the trial court's cautionary instruction minimized the potential for any unfair prejudice. Under these circumstances, the trial court did not abuse its discretion in allowing the statement.

C. Other Acts Evidence

Defendant argues that he was denied a fair trial because of the admission of evidence that he had previously been in prison, and of his involvement in insurance fraud, drug dealing, and receiving and selling stolen goods. He argues that this evidence was inadmissible under MRE 404(b), and that the cumulative effect of the evidence denied him a fair trial. At trial, defendant only objected to the evidence of his prior imprisonment. Because defendant did not object to the remaining evidence, we review these latter challenges for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

MRE 404(b) prohibits evidence of prior bad acts to prove a person's character, but permits the admission of such evidence for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system. The evidence must be offered for something other than a character or propensity theory, it must be relevant under MRE 402, and the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004).

In *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), our Supreme Court held that MRE 404(b) does not preclude admission of other-acts evidence that is offered as part of the *res gestae* of the charged offense, in order to provide the jury with a complete picture of the relevant circumstances. The Court, quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), observed:

It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence.

Additionally, evidence of other criminal acts is admissible when the acts are "so blended or connected with the crime of which defendant is accused that proof of one incidentally involves

the other or explains the circumstances of the crime. *Sholl, supra* at 742, quoting *State v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964).

Here, defendant's prior imprisonment, and his involvement with various illegal schemes, was part of the complete story surrounding Sanders's death. This case involved defendant and Sanders's association in various elaborate criminal schemes, including their formation of a corporation as part of a conspiracy to obtain a large corporate life insurance policy and then defraud the life insurance company by fabricating the victim's death. The prosecution's theory at trial was that Sanders's death was linked to this latter conspiracy. Evidence of the full context of defendant and Sanders's past history, including their shared imprisonment and cooperation in other criminal acts, was necessary to enable the jury to properly understand how defendant became involved in a scheme to fake Sanders's death and why Sanders trusted defendant.

Jeremy Gatz's testimony was key to establishing this history. Gatz described the plans that defendant and Sanders formed in prison. Without Gatz's testimony, the jury would not have understood the events that led up to Sanders and defendant's meeting in the parking lot at the Twelve Oaks Mall. They also would not have understood the significance of other evidence, such as the formation of Extensive Enterprises, the business life insurance policies, or Sanders's interest in changing his identity and adopting Norwegian citizenship. The fact that Gatz learned about these plans while in prison with defendant and Sanders provided the necessary context for evaluating his knowledge and credibility. Because this evidence was admissible as part of the *res gestae* of the offense, the trial court did not abuse its discretion in allowing evidence of defendant and Sanders's imprisonment together, and the evidence of defendant's other bad acts was not plain error.

Furthermore, defendant's substantial rights were not affected because defendant relied on much of this evidence as a basis for his defense. Defendant's theory that Sanders intended to use fraudulently-obtained insurance proceeds to purchase a large quantity of marijuana for resale depended on evidence that defendant knew about the fabricated robbery of the property from the trailer that Sanders was buying from defendant. Additionally, Gatz's testimony regarding Sanders's drug-dealing plans tended to bolster defendant's credibility by corroborating many of defendant's statements.

Moreover, the trial court did not neglect its duty to control the proceedings, but instead provided a cautionary instruction advising the jury on the limited purpose of the evidence and that it "must not convict the defendant here because you think he is guilty of other bad conduct."

Because the trial court did not abuse its discretion in allowing the evidence of defendant's imprisonment, and because there was no plain error in the admission of the other bad-acts evidence, we also reject defendant's argument that the cumulative effect of the evidence denied him a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001).

D. Prosecutor's Conduct

Defendant argues that the prosecutor committed misconduct when he commented, during closing argument, that defendant had spent 11 days "negotiating" with Detective Lauria before agreeing to give his first interview. Defendant argues that the prosecutor improperly commented on his constitutional right to remain silent. Defendant's failure to object to the prosecutor's

comments at trial limits our review to plain error affecting his substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The Michigan and United States Constitutions guarantee a defendant the right against compelled self-incrimination. *People v Fields*, 450 Mich 94, 108-110; 538 NW2d 356 (1995); US Cons, Am V; Const 1963, art 1 §§ 15, 17. To effectuate this right, no reference may be made to a defendant's failure to testify. However, a defendant's constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and before *Miranda* warnings have been given, so a prosecutor may "comment on silence that occurred before any police contact." *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005).

Here, the prosecutor did not comment on defendant's silence, but on his uncooperativeness in scheduling an interview. Because there was no custodial interrogation, and because defendant did not assert his right to remain silent, the prosecutor's argument was not improper. The prosecutor's comment was similar to the challenged comment in *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996), in which this Court held that the prosecutor did not commit misconduct when he remarked in closing argument that the defendant canceled a scheduled interview with the police. The Court explained that the defendant's Fifth Amendment rights were not implicated because he was not in custody, and had not invoked his Fifth Amendment right at the time the interview was canceled. *Id.* Accordingly, we find no error, plain or otherwise.

E. Sentencing

Defendant raises several claims of sentencing error. He first argues that the trial court erred in scoring ten points for offense variable 19 of the sentencing guidelines.

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *Id.*

MCL 777.49(c) provides that ten points should be scored for OV 19 when "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." In *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004), our Supreme Court held that ten points were properly scored for OV 19 when a defendant provided a false name to the police, because this conduct interfered with the administration of justice. Here, defendant gave Detective Lauria two conflicting versions of his meeting with Sanders on the night Sanders was last seen. At least one of these versions had to be false. By providing a false statement in response to a police officer's investigation, defendant interfered with the administration of justice. Therefore, the record supports the trial court's ten-point score for OV 19.

Defendant also argues that MCL 777.49(c) is unconstitutionally vague. Because defendant did not challenge the constitutionality of the statute in the trial court, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2003). "A statute may be unconstitutionally vague if (1) it is overbroad, impinging on First Amendment freedoms, (2) it fails to provide fair notice of the

conduct proscribed, or (3) it is so indefinite that it confers unlimited and unstructured discretion on the trier of fact to determine whether an offense has occurred.” *People v Hrlic*, 277 Mich App 260, 263; 744 NW2d 221 (2007). “A statute is unconstitutionally vague if persons of ordinary intelligence must necessarily guess at its meaning.” *People v Pierce*, 272 Mich App 394, 398-399; 725 NW2d 691 (2006).

MCL 777.49(c) is not unconstitutionally vague because the critical terms “interfere,” “administration,” and “justice” have clear and ordinary meanings, and they are not used in an unusual or obscure context. A person of ordinary intelligence should be able to understand what type of conduct will result in the trial court adding points toward the defendant’s offense variable score. *Hrlic*, *supra*.

Defendant also argues that his sentence constitutes cruel and unusual punishment because he is unlikely to live long enough to complete the sentence.² Although MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information, this limitation on review is not applicable to claims of constitutional error. *People v Conley*, 270 Mich App 301, 315-316; 715 NW2d 377 (2006). “However, a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment.” *People v Powell*, 278 Mich App 318, 323; ___ NW2d ___ (2008), lv pending (citations omitted).

Defendant relies on *People v Moore*, 432 Mich 311, 325-326; 439 NW2d 684 (1989), in which our Supreme Court held that it was an abuse of discretion to impose a sentence of 100 to 200 years for second-degree murder, because it would be impossible for the defendant to serve this sentence. However, in *People v Lemons*, 454 Mich 234, 257-259; 562 NW2d 447 (1997), our Supreme Court held that *Moore* was superseded by its decisions in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994). See also *People v Phillips*, 227 Mich App 28, 31 n 2; 575 NW2d 784 (1997); *People v Kelly*, 213 Mich App 8, 15; 539 NW2d 538 (1995) (holding that *Moore* is no longer good law). Thus, defendant’s reliance on *Moore* is misplaced. Defendant has failed to overcome the presumption of proportionality and, therefore, has not shown that his sentence is unconstitutionally cruel or unusual.

Finally, defendant argues that the trial court erred in scoring the sentencing guidelines based on facts not found by the jury. In support of this argument, defendant relies on the United States Supreme Court’s decisions in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). In these cases, the United States Supreme Court held that it is a violation of the Sixth Amendment for a sentencing court to increase a defendant’s *maximum* sentence based on facts not found by a jury. However, our state Supreme Court has held that these decisions do not apply to Michigan’s

² Sentences that constitute cruel and unusual punishment are prohibited under the United States Constitution; sentences that are either cruel or unusual violate the Michigan Constitution. US Const, Am VIII; Const 1963, art 1, § 16.

indeterminate sentencing scheme, in which a defendant's maximum sentence is fixed by statute, and the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140, 159-160; 715 NW2d 778 (2006). Thus, there is no merit to this claim of sentencing error.

F. Double Jeopardy

Defendant argues that his dual felony-firearm convictions violate the constitutional protections against double jeopardy. A double jeopardy challenge presents a constitutional issue that is reviewed de novo on appeal. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). But because defendant did not challenge the validity of his two felony-firearm convictions in the trial court, this issue is not preserved. Accordingly, we review this issue for plain error affecting substantial rights. *Pipes, supra* at 274.

The Double Jeopardy Clauses of the United States and Michigan Constitutions, US Const, Am V; Const 1963, art 1, § 15, protect against multiple prosecutions and multiple punishments for the same offense. *Nutt, supra* at 574. In *People v Morton*, 423 Mich 650, 656; 377 NW2d 798 (1985), our Supreme Court held that multiple felony-firearm convictions, corresponding to multiple convictions of predicate felonies arising from the same criminal transaction, are permissible because “the Legislature intended, with only a few narrow exceptions, that every felony committed by a person possessing a firearm result in a felony-firearm conviction.” Here, defendant was convicted of two felonies, second-degree murder and possession of a firearm by a felon. Therefore, multiple felony-firearm convictions were permissible.

Further, the felony-firearm statute, MCL 750.227b(1), specifically provides the “narrow exceptions” to the rule that a felony-firearm conviction result from every felony committed by a person in possession of a firearm. The felon-in-possession statute, MCL 750.224f, is not one of the exceptions set forth in MCL 750.227b(1). Thus, felon-in-possession is a proper predicate felony for felony-firearm, and dual convictions for both felony-firearm and felon-in-possession do not violate double jeopardy protections. *People v Calloway*, 469 Mich 448, 449-450; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 167; 631 NW2d 755 (2001).

G. Ineffective Assistance of Counsel

Defendant also argues that trial counsel was ineffective for failing to object or preserve the various issues raised in this appeal.

To establish ineffective assistance of counsel, “a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, it not for counsel's errors, the result of the proceeding would have been different and the result that did occur was fundamentally unfair or unreliable.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007); see also *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Defense counsel is given wide discretion in matters of trial strategy because of the many calculated risks involved in representing a defendant at trial. *Odom, supra* at 415. Therefore, this Court presumes that counsel was effective in matters of trial strategy, and will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. *Id.*

Trial counsel was not ineffective for failing to object to the trial court's decision to accept the jury's verdict without first requiring the court to respond to the jury's earlier questions. As discussed, *supra*, there was no basis for an objection once the jury announced it had reached a verdict. Trial counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Defendant has also failed to show that a different outcome reasonably might have resulted had trial counsel objected. The record establishes that the jury rejected the higher charge of first-degree premeditated murder and unanimously agreed that defendant was guilty of second-degree murder, so there is no basis for inferring that the jury would have reached a more favorable verdict if the trial court had given supplemental instructions in response to the jury's requests for reinstruction on premeditation and unanimity.

Because there was no basis for excluding defendant's civil deposition testimony, or the evidence of defendant's prior bad acts, defense counsel was not ineffective for failing to object to this evidence. Similarly, counsel was not ineffective for failing to object to the prosecutor's closing statements, because the statement were not improper.

Defendant also argues that counsel was ineffective for failing to file a sentencing memorandum. But because defendant has failed to establish any sentencing error, he has not shown that counsel's failure to submit a sentencing memorandum either was a serious error or affected the trial court's sentencing decision.

Lastly, because defendant's dual felony-firearm convictions were legally permissible, defense counsel was not ineffective for failing to raise this issue below.

Because defendant's numerous allegations of trial error lack merit, counsel's failure to advocate a meritless position does not constitute ineffective assistance.

H. Cumulative Error

Finally, defendant argues that he was denied a fair trial because of the cumulative effect of several individual errors. Because no other errors have been identified, there can be no cumulative effect of several errors and reversal under a cumulative error theory is unwarranted. *Knapp, supra* at 387.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Deborah A. Servitto